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ALLIED METALCRAFT CORPORATION SDN BHD

v.

KETUA PENGARAH HASIL DALAM NEGERI

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HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[CIVIL APPEAL NO: R1-14-01-04]
23 FEBRUARY 2009

C ***CIVIL PROCEDURE:*** *Appeal - Admission - Withdrawal of erroneous admission - Whether appellant could withdraw an erroneous admission of law in appeal from case stated - Whether tantamount to High Court usurping powers of Special Commissioners of Income Tax - Whether appeal dismissed*

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This was an appeal by the appellant against a deciding order of the Special Commissioners of Income Tax ('SCIT'). *Vide* the deciding order, the SCIT confirmed the assessment made by the respondent and determined that expenses incurred by the

E appellant for providing the appellant's sales persons with free tickets for overseas trips were entertainment expenses and thereby not deductible in the calculation of the appellant's tax liability pursuant to s. 39(1)(l) of the Income Tax Act 1967 ('the Act'). Upon a request of the appellant the SCIT stated a case ('case

F stated') for the determination of the High Court pursuant to para. 34 sch. 5 of the Act. The appellant did not propose to appeal on the issues decided upon by the SCIT, but submitted that the concession made before the SCIT by the previous counsel that the 'free tickets for overseas trip were incentive payments in the

G form of entertainment' was an erroneous admission of law. The appellant would like to withdraw it. The respondent however submitted that the court could not go beyond the dimension of the case stated and if the court was to accede to the appellant's submission, the case stated would have come to naught. The

H issue that arose was whether (i) the appellant could withdraw an erroneous admission of law in an appeal from a case stated and (ii) if the answer was in the affirmative, whether this court had the jurisdiction to hear and determine the question of law which was not determined by the SCIT *ie*, whether the free overseas tickets

I constituted entertainment expenses under s. 39(1)(l) of the Act.

Held (dismissing the appeal):

(1) The High Court is only seised with jurisdiction when there is an appeal on a question of law against a deciding order to be decided by way of case stated which means after the appeal has been heard and determined by the SCIT in accordance with the prescribed procedure in sch. 5. In view of the statutory provisions regulating an appeal in a tax case as alluded to which have to be adhered and given effect to, the court could not entertain and allow the withdrawal of an erroneous admission of law as urged upon by the appellant as to do so would tantamount to the High Court usurping the powers of the SCIT. The withdrawal of an erroneous admission of law could not be equated to a question of law which was to be heard and determined by the High Court pursuant to para. 34 of sch. 5 only *vide* a case stated. The principle that an erroneous admission of law could be withdrawn at any time by counsel could not be applied in the present circumstances of the instant case. Since the answer to the first issue was in the negative, the second issue did not arise. Further, the appellant had conceded that he was not appealing against the findings of the SCIT, thus the decision of the SCIT had not been challenged but was deemed to be correct. (paras 10, 11, 12, 13, & 15)

Case(s) referred to:

Ahmad Tajudin Hj Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1997] 2 CLJ 225 CA ***(refd)***

Aspac Lubricants (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2007] 5 CLJ 353 CA ***(refd)***

Che Esah & Anor v. Che Limah [1966] 1 MLJ 36 ***(refd)***

Chua Lip Kong v. Director-General of Inland Revenue [1982] 1 MLJ 235 ***(refd)***

Edwards (Inspector of taxes) v. Bairstow & Harrison [1956] AC 14 ***(refd)***

Lower Perak Cooperative Housing Society v. KPHDN [1994] 3 CLJ 541; [1994] 3 BLJ 265 SC ***(refd)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetables Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

United Detergent Industries Sdn Bhd v. Director General of Inland Revenue [1998] 1 LNS 176 ***(refd)***

Yap Cheng Kee & Anor v. Ow Giam Eng & Anor [1977] 1 MLJ 177 ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 18, 19, 39(1)(l), 102(4)

A *For the appellant - Francis Tan; M/s Azman, Davidson & Co*
For the respondent - Norhisham Ahmad; SFC

Reported by Suhainah Wahiduddin

B

JUDGMENT

Lau Bee Lan J:

Background

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[1] This is an appeal by the Appellant against a deciding order of the Special Commissioners of Income Tax ("SCIT") made on 8 October 2002. *Vide* the deciding order, the SCIT confirmed the assessment made by the respondent and determined that expenses
D incurred by the appellant for providing the appellant's sales persons with free tickets for overseas trips were entertainment expenses and thereby not deductible in the calculation of the appellant's tax liability pursuant to s. 39(1)(l) of the Income Tax Act 1967 ("the Act"). Upon a request of the appellant the SCIT
E on 19 April 2004 stated a case ("Case Stated") for the determination of the High Court pursuant to para 34 Schedule 5 of the Act.

[2] The question for the determination of the High Court is
F whether on the facts as found by the SCIT and contained in the Case Stated the Deciding Order of the SCIT made on 8 October 2002 was correct in law.

[3] The facts, admitted and proved as found by the SCIT as a result of the evidence adduced before the SCIT are:

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6.1. Facts Admitted

1. The Appellant carries on a business of selling cookware, kitchen utensils and water filters under the registered name of Allied Metalcraft Corporation Sdn. Bhd.

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2. The Appellant sells its stainless steel cookware and water filters to the public through individuals whom it pays commission.

3. In addition, the Appellant provides free trip/ticket to overseas
I for these individuals who attains *(sic)* certain sales quota.

4. The Appellant incurs expenses for free tickets to overseas given to the individuals.

5. From the Year of Assessment 1989 onwards, the expenses were not allowed by the Respondent.

6. The Appellant filed Notices of Appeal dated 25.2.2000 in respect of the following:

Year of Assessment	Type of Assessment	Amount RM
1989	Additional	32,650.40
1990	Additional	39,169.26
1991	Additional	71,303.96
1992	Additional	97,877.04
1993	Original	449,733.98
1994	Additional	86,677.76
1995	Additional	56,990.70
1996	Original	445,423.00
1996	Additional	1,386.00
1997	Additional	80,220.00

Facts Proved

(i) The Appellant has a licence under the Direct Sales Act.

(ii) The individual sale person is paid in the form of commission based on sales. The Appellant has full control of the sale proceeds made through the individual who made the sales.

(iii) The individual sale person do *(sic)* not contribute to any employees provident fund on the commission paid to him.

(iv) The free ticket for the overseas trip also includes accommodation provided to the individual.

(v) The said expenses for the free ticket was allowed as a deduction by the Respondent for the Years of Assessment 1982 to 1988.

(vi) For the subsequent six (6) Years of Assessment, the Respondent continued to allow the deduction for the Years of Assessment 1989 to 1992, 1994 and 1995.

(vii) The Notice of Assessment for the year of Assessment 1993 was not issued until 31.12.1998.

(viii) The deduction was first disallowed when the assessment for the year of Assessment 1996 was issued on 27.11.1996.

(ix) The Appellant appealed against the Notice of Assessment for the Year of Assessment 1996 on 27.11.1996.

(x) The Respondent again disallowed the deduction for the Year of Assessment 1997 and issued the Notice of Additional Assessment on 31.12.1998.

(xi) The Respondent disallowed the deduction for the years of Assessment 1989 to 1992, 1994, 1995 and 1997 and issued additional assessments for these years of assessment on 31.12.1998. The deduction was also disallowed for the Year of Assessment 1993.

Appellant's Contention

[4] The learned counsel for the appellant submitted he did not propose to appeal on the issues decided upon by the SCIT ie,:

(i) whether the individual salesmen were employees or non-employees of the appellant; and

(ii) the appellant had a legitimate expectation that the respondent would allow the expenses as a deduction and would expect the respondent to continue to allow the deduction.

[5] Learned counsel for the appellant further submitted that on the facts particularly, paras 1, 2, 3 and 4 under "facts admitted", the SCIT were not justified in law in reaching the conclusion that the expenses incurred for the overseas tickets for the sales persons of the appellant were entertainment. In this regard learned counsel basically argued:

(i) there is a distinction to be made between "entertainment" in the sense used in s. 18 of the Act and the promotional items used as incentives for promotion of business citing *United Detergent Industries Sdn Bhd v. Director General of Inland Revenue* [1998] 1 LNS 176; [1999] 1 AMR 462 (H/C) and *Aspac Lubricants (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2007] 5 CLJ 353;

(ii) the court ought to adopt a purposive approach in interpreting s. 18 of the Act premised on *Palm Oil Research and Development Board Malaysia & Anor. v. Premium Vegetables Oils Sdn. Bhd.* [2004] 2 CLJ 265 in that the term "entertainment" does not include the provision of free tickets to the appellant's sales persons who have achieved certain sales quota.

(iii) that s. 39(1)(l) of the Act was never intended to disallow deduction of expenses of the kind under appeal.

I shall not dwell further into this for reasons which will become apparent later.

[6] However for purposes of this appeal in order for the court to consider this line of argument the learned counsel for the appellant submitted that the concession made before the SCIT by the previous counsel that "the free tickets for overseas trip were incentive payments in the form of entertainment" is an erroneous admission of law and he would like to withdraw it and he cited the cases of *Ahmad Tajudin Hj. Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1997] 2 CLJ 225 (CA) and *Yap Cheng Kee & Anor v. Ow Giam Eng & Anor* [1977] 1 MLJ 177 (F/C) at p. 178 to support his proposition.

Respondent's Contention

[7] Learned counsel for the respondent submitted the court cannot go beyond the dimension of the case stated and if the court is to accede to the appellant's submission, the case stated would have come to naught citing *Chua Lip Kong v. Director-General of Inland Revenue* [1982] 1 MLJ 235 at pp. 236-237, *Edwards (Inspector of taxes) v. Bairstow & Harrison* [1956] AC 14 at pp. 29, 35-36 and *Lower Perak Cooperative Housing Society v. KPHDN* [1994] 3 CLJ 541; [1994] 3 BLJ 265 (SC). Both parties had conceded in their submissions that the free tickets for overseas trips given to the individuals who attain sales were incentive payments in the form of entertainment; therefore the question of whether the free tickets fall under the definition of "entertainment" was never an issue but centered on whether the free tickets in the form of entertainment fall under the proviso (i) of para 39(1)(i) of the Act and hence are entitled to be deducted as revenue expenditure under s. 33(1) of the Act ie, whether the individual salesmen were employees or non-employees of the appellant.

A (ii) that the cases of *Ahmad Tajudin bin Hj. Ishak (supra)* and *Yap Cheng Kee & Anor (supra)* were civil cases and were ordinary appeals and not in the nature of an appeal from a case stated.

Issue

B **[8]** (i) Whether the appellant can withdraw an erroneous admission of law in an appeal from a case stated?

(ii) If the answer is in the affirmative, whether this court has the jurisdiction to hear and determine the question of law which C was not determined by the SCIT ie, whether the free overseas tickets constituted entertainment expenses under s. 39(1)(l) of the Act.

Decision

D **[9]** In *Ahmad Tajudin bin Hj. Ishak (supra)* the Court of Appeal in drawing support from two out of several authorities, *Che Esah & Anor v. Che Limah* [1966] 1 MLJ 36 and *Yap Cheng Kee & Anor (supra)* opined at p. 251 "it is well-settled that counsel is not E bound by an erroneous admission of law, he may withdraw it at any time; even on appeal. If a judge acts upon an erroneous admission of law, this court is not bound by his views. We may look at the matter afresh". It is without doubt that both *Ahmad Tajudin bin Hj. Ishak (supra)* and *Yap Cheng Kee & Anor (supra)* F were civil cases and were ordinary appeals and not in the nature of an appeal from a case stated as submitted on the respondent's behalf.

[10] In order to ascertain whether in an appeal from a case stated the appellant can withdraw an erroneous admission of law G as alluded to in *Ahmad Tajudin bin Hj. Ishak (supra)* and *Yap Cheng Kee & Anor (supra)*, it is my opinion that one has to consider the nature of the appeal in question. In the instant case s. 99 of the Act provides that a person aggrieved by an assessment may appeal to the SCIT in accordance with certain prescribed procedure. H Section 102 of the Act provides for disposal of appeals; whilst s. 102(4) of the Act provides that when an appeal has been sent to the SCIT, the hearing and determination of the appeal shall be regulated by Schedule 5. Further, amongst the procedure provided for in Schedule 5 is para 34 which allows either party to I proceedings before the SCIT to appeal on a question of law against the deciding order of the SCIT by way of case stated. In

other words the High Court is only seised with jurisdiction when there is an appeal on a question of law against a deciding order to be decided by way of case stated which means after the appeal has been heard and determined by the SCIT in accordance with the prescribed procedure in Schedule 5. In view of the statutory provisions regulating an appeal in a tax case as alluded to which have to be adhered and given effect to, the court cannot entertain and allow the withdrawal of an erroneous admission of law as urged upon by the learned counsel for the appellant as to do so would be tantamount to the High Court usurping the powers of the SCIT.

[11] Further, it is observed that learned counsel has in his Supplemental Outline Submission stated "The issue of whether the overseas tickets constituted entertainment expenses under s. 39(1)(l) of the (Act) **is a question of law** and it is further submitted **that this is to be determined by the High Court by way of case stated**." (emphasis added). The withdrawal of an erroneous admission of law to my mind cannot be equated to a question of law which is to be heard arid determined by the High Court pursuant to para 34 of Schedule 5 only *vide* a case stated.

[12] In *Lower Perak Cooperative Housing Society v. KPHDN* [1994] 3 CLJ 541; [1994] 3 BLJ 265 the Supreme Court approved and followed the principles enunciated in *Bairstow & Harrison (supra)* (at pp. 35-36) pertaining the duty of the court when hearing appeals from the SCIT:

> If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is obviously, erroneous in point of law. But without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part I prefer the last of

A the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

B 12.1 In this appeal before the court none of the principles can be applied because the learned counsel for the appellant has conceded that he was not appealing against the findings of the SCIT on (i) whether the individual salesmen were employees or non-employees of the C appellant (in fact counsel admitted that the sales person were not employees); and (ii) the appellant had a legitimate expectation that the respondent would allow the expenses as a deduction and would expect the respondent to continue to allow the deduction. Thus the D decision of the SCIT has not been challenged but is deemed to be correct.

[13] An added factor would be the point raised by learned counsel for the respondent as to how is the court to decide on E the issue whether the free tickets to overseas for the individuals is in the form of entertainment when no evidence was adduced through examination of witnesses on this issue. With regret I am unable to accept learned counsel for the appellant's reply that the facts under heading "Facts Admitted" as per para 6.1.2 and 6.1.3 F are sufficient to determine the issue. I find there is merit in the concern raised by the learned counsel for the respondent especially since the SCIT is empowered to summon witnesses and the production of documents by them and hearing evidence on oath under s. 19 of the Act.

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[14] For the reasons stated, am of the view that the principle that an erroneous admission of law can be withdrawn at any time by counsel cannot be applied in the present circumstances of the instant case.

H **[15]** Since the answer to the 1st issue is in the negative, the 2nd issue does not arise. The appeal is hereby dismissed with costs.

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